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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1931

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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No. 252

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE for the District of Georgia, petitioner

v.

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OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia (R. 22–24) was filed June 2, 1930, and has not been reported. The opinion of the Circuit Court of Appeals (R. 28–29) is reported in 49 F. (2d) 85.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1931. (R. 30.) The peti-

tion for a writ of certiorari was filed July 22, 1931, and was granted October 19, 1931. (R. 31.)

QUESTION PRESENTED

Where the Commissioner of Internal Revenue has assessed a tax upon a certain product as oleomargarine, under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity, for the sole purpose of restraining collection of the tax assessed, be maintained when the real ground of the suit is that the statute, properly construed, does not authorize the assessment of a tax upon the product in question?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are contained in the petitioner's brief filed in *Peter H. Miller* v. *Standard Nut Margarine Co.*, No. 251, October Term, 1931.

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture in Florida and sale in many States, including Georgia, of a product known as Southern Nut Product, a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1, 2, 8.) Prior to the commencement of this action and on or about April 15, 1930, the Commissioner of Internal Revenue held that the said compound

was taxable as artificially colored oleomargarine, whereupon the petitioner proceeded to collect taxes and license fees from dealers and persons handling said product in the State of Georgia as provided by the oleomargarine law (Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541)). (R. 8, 16.) This action was brought to restrain collection of any further tax on the "Southern Nut Product."

The bill of complaint alleges (R. 9) that "Southern Nut Product" is not oleomargarine as that term is defined in Section 2 of the Oleomargarine Act, *supra,* and that its taxation is therefore not justified or authorized by said Act. Petitioner's answer to the bill of complaint alleged that "Southern Nut Product" was artificially colored oleomargarine and was taxable. (R. 17.)

A preliminary injunction was denied by the District Court of the United States for the Northern District of Georgia (R. 22), and petitioner's motion to dismiss the bill was granted. (R. 25.) The respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which reversed the District Court. (R. 29.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that an injunction should have been granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

ARGUMENT

The question involved is the same as that in No. 251, *Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Petitioner,* v. *The Standard Nut Margarine Company of Florida, a Corporation,* and the petitioner's brief in that case, filed simultaneously herewith, discusses the principles of law applicable to both cases.

There is an immaterial difference in the status of the respondent in the two cases. In the *Miller* case respondent manufactured its product and was directly liable for the manufacturer's tax in the collection district of Florida. In this case it is not directly liable in the district of Georgia, but the persons to whom it sells are subject to tax as dealers in oleomargarine. We submit that this does not affect the question involved. The bill of complaint shows that respondent is directly and primarily liable for the tax in another district (R. 1–2), and this action, therefore, is none the less one to restrain the collection of a tax.

The status of respondent in this case is to be distinguished from that of the plaintiff in *Long* v. *Rasmussen,* 281 Fed. 236 (Mont.) (*Cf. Ralston* v. *Heiner,* 21 F. (2d) 494 (W. D. Pa.), affirmed, 24 F. (2d) 416 (C. C. A. 3d), certiorari denied, 277 U. S. 608), whose property was being distrained for taxes to which she was a stranger. This case likewise differs from *Pollock* v. *Farmers' Loan &*

Trust Co., 157 U. S. 429, and similar cases where stockholders sought to compel the performance of fiduciary obligations resting on their respective corporations.

For the reasons urged in petitioner's brief in No. 251 the judgment of the court below should be reversed.

Respectfully submitted.

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